State of Michigan
Supreme Court
Appeal from Michigan Court of Appeals
Cavanagh, P.J., and Jansen and Meter, JJ.

Timothy Pierron,
Plaintiff-Appellant,

v

Kelly Pierron,
Defendant-Appellee.

Supreme Court No. 138824
Court of Appeals No. 282673
Trial Court No. 99-920324-DM

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Reply Brief on Appeal - Appellant

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Reply to Counter-Statement of Facts and Proceedings

Appellee begins her Counter-Statement of Facts and Proceedings with the claim on p 1 that her unilateral decision to relocate to Howell and remove the children from their established schools was "fully within the law." She is incorrect. Although the move of approximately 60 miles does not trigger the restrictions in MCL 722.31 (the so-called 100-mile rule), appellee ignores both the joint custody stature requiring shared decision-making and the specific provisions of the agreed-upon divorce judgment giving each party "equal" decision-making authority over where the children attend school. MCL 722.26a(7)(b); Appellant's Appendix 2a.

Also on p 1, appellee alleges that she "has always been the primary caregiver for the minor children." This is only nominally true. Both the trial court and the Court of Appeals agreed that the children had an established custodial environment with both parents. Appellant's Appendix 962a-963a, 1011a. Appellee focuses too much on the language of the judgment and amended judgment concerning primary residence. The facts, not the language of court orders, determine the existence of an established custodial environment. *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982). The designation as "primary residential parent" or something similar is irrelevant in a case such as this. Neither the joint custody statute nor the parties' divorce judgment give decision-making preference to the primary physical custodian over the other joint legal custodian.

At p 2 appellee asserts that she could not accept appellant's offer of a huge discount to purchase his home in Grosse Pointe Woods because she already purchased

the condominium near Howell. She fails to acknowledge her high-risk gamble in rushing to purchase the condo before either negotiating a school enrollment agreement with appellant or obtaining permission from the trial court to enroll the children in Howell schools. Appellant's Appendix 23a-121a. It was her hasty decision to commit much of the money she inherited from her father to the condo purchase that locked her into a position that she has been unable or unwilling to move from. That decision, more than anything else, has trapped these parties in this lengthy and expensive litigation.

Nor is it true, as alleged at p 2, that the children "live in Howell." Starting in October of 2007, near the end of the trial court proceedings on the school enrollment issue, the children have spent the entire school week residing with appellant, not appellee, who refused to continue transporting them to and from school in Grosse Pointe. Appellant's Appendix 952a-953a. This arrangement continued for the balance of the 2007-2008 and all of the 2008-2009 school years. Only recently, with the commencement of the 2009-2010 school year, is appellee again transporting the children from her home to school out of concern that the arrangement in place the last two years may have created a new established custodial environment for the children with appellant. The children now endure an hour and a half trip in the car before and after school each day. The bottom line is that the children "live" in both homes.

Appellee's attempt to characterize appellant's parenting time at pp 3-5 is misleading. She fails to note the overwhelming significance of the proximity that existed between her home and that of appellant before she relocated to Howell.

Appellant's Appendix 967a-970a. When parents live only blocks apart, the children move freely between their respective homes without the need for a specific parenting time schedule.

Appellant testified to exercising parenting time each weekend for at least part of the weekend. Appellant's Appendix 156a-157a. There was also parenting time during weekday mornings and afternoons when he worked afternoon shift, which occurred once every 7 weeks. *Id.* He also took the children to church with him regularly. Appellant's Appendix 190a. Ms. Pierron did not. Appellant's Appendix 146a. Appellant drove Madeline to her weekly dance class at Turning Point. Appellant's Appendix 173a.

Appellee also inaccurately minimizes appellant's substantial role in the children's education and activities. As found by the trial court, appellant "was involved on a continuing basis with the children's education. He visited the schools regularly, took the children to lunch on occasions, picked them up from tutoring, attended parent-teacher conferences, and saw them regularly despite the absence of a specific parenting time schedule." Appellant's Appendix 962a.

The trial court's findings were supported by appellant's testimony. Appellant's Appendix 159a-162a. He closely monitored the children's progress and engaged a tutor at his sole expense to assist the children with academic problems. Appellant's Appendix 174a, 180a-182a, 285a. This was verified by the children's tutor, Deborah Dixon. Appellant's Appendix 290a-291a, 295a-296a, 298a-301a.

At p 5, appellee misrepresents appellant's testimony concerning his relationship with Andrew before appellee's unilateral decision to relocate the children to Howell.

The transcript makes it clear that the relationship was "great" and "fantastic" before there were discussions about moving to Howell. Appellee's Appendix 124b-125b. The actual move to Howell then exacerbated the problems that began when appellee revealed her relocation plans. Appellee's Appendix 125b.

Any rift that currently exists between appellant and Andrew is completely and exclusively due to appellee's unilateral decision to move to Howell and her efforts to manipulate Andrew into becoming an advocate for that move. Appellant's Appendix 962a-963a. Other than the needless expenditure of money on litigation that could have been used for the children's college (and graduate school) costs, the most profound tragedy of this case is the way appellee has placed the children in the middle of the conflict and harmed Andrew's relationship with his father.

At pp 6-8, appellee accuses appellant of misrepresenting her position and actions in the trial court, particularly related to her effort to obtain what she hoped would be favorable publicity that would pressure the trial court to rule in her favor. However, she admits as much at p 6 when she states that she went to The Detroit News to have them run a story because "she did not know how to prove to this trial judge" that the Howell schools would be better for these children." Could this entire conflict be the result of appellee initially receiving inaccurate legal advice that she, as the parent with primary residence, could unilaterally decide where the children attend school despite the clear language of the joint custody statute, the governing case law, and the agreed-upon terms of the divorce judgment?

Nor is it true as alleged at p 7 that appellant "just volunteered" the statement that Andrew hung-up the telephone on him after reporting that his half-brother, Ian, met with appellee's counsel to discuss the litigation. The statement was made by appellant in response to a question from the trial judge during cross-examination of appellant by appellee's counsel. Appellee's Appendix 123a-124a. Contrary to appellee's representation, the information was not volunteered and it was not during appellant's direct examination by his counsel. This is yet another example of appellee playing fast and loose with the facts that overwhelmingly supported the trial court's decision to deny the change in school enrollment. Also, it is sad that both appellee and her counsel are so obviously implicated in efforts to manipulate the children around the school enrollment issue.

Reply to Argument

At p 11, appellee argues that the school enrollment choice is between the district where the children now have their primary residence and where they used to have their primary residence. This is misleading. The children have a joint established custodial environment in the homes of both parents. Appellant's Appendix 962a-963a, 1011a. It is undisputed that beginning almost immediately after the start of the 2007-2008 school year, the children have resided primarily with appellee during the school year. They continued to attend school from his home in Grosse Pointe Woods. Appellant's Appendix 952a-953a. Only very recently, out of fear that a new custodial environment was becoming established with appellant, has appellee begun to drive the children to

and from her home near Howell to school in Grosse Pointe each day. As a result, the children endure a long drive before and after school.

At p 14, appellee argues that the children's joint established custodial environment in the homes of both parents would not change if they attended Howell schools. Although the Court of Appeals also adopted the view, such a view strains credibility. It has been established by both parties that the drive between Howell and Grosse Pointe, if done on a daily or regular basis, is difficult, time-consuming, onerous, and even dangerous.

Appellant's testimony was that the drive from Grosse Pointe to Howell "is a two-hour drive one way, best case scenario coming after work. Appellant's Appendix 207a, 283a. Indeed, appellee complained about being "forced" to make this trip (in the opposite direction) during "high traffic hours" to take the children from her home to school in Grosse Pointe pending the trial court's decision. Appellant's Appendix 952a-953a. She further referred to this drive as "a dangerous drive" in the winter. Appellant's Appendix 984a. She made it clear she was "unable and unwilling" to make that round-trip drive. Appellant's Appendix 27a-28a.

Yet appellee continues to insist that the distance and the required drive would not be disruptive of the children's joint custodial environment with appellant if he is forced to make that drive. It is worth noting that appellee was unemployed and had no work schedule to accommodate when she complained of the lengthy drive. She never explained how the trip could be so burdensome to her, yet should not be considered a

disruption to the portion of the shared established custodial environment that was with appellant.

Appellee ignores the compelling testimony establishing the substantial role played by appellant in the children's education and school activities. Appellant's Appendix 159a-162a, 174a, 180a-182a, 285a, 290a-291a, 295a-296a, 298a-301a, 962a. It would be impossible for that involvement, or anything even remotely resembling it, to continue if the children attend school in Howell.

At p 20 appellee argues that the merits of the trial court's school enrollment decision should be reviewed in light of alleged changes in the children's established custodial environment taking place in the nearly two years since the trial court's ruling. This is at least the third time appellee has improperly attempted to expand the record before either this Court or the Court of Appeals. On both prior occasions, orders were entered striking from the appellate record improper extra-record affidavits filed by appellee. MCR 7.210(A)(1); *People v Taylor*, 383 Mich 338, 362, 175 NW2d 715 (1970).

Also on p 20., appellee incorrectly argues that the children's life-long attendance of the Grosse Pointe schools is not relevant to their established custodial environment. Yet earlier on that page she cites *Baker v Baker*, 411 Mich 567, 581-583, 309 NW2d 532 (1981). More than any other Michigan case, *Baker* stands for the proposition that a child's school attendance is an important part of that child's established custodial environment. As stated in *Baker*, among the factors this Court found to be important in determining the existence of an established environment was the child's "attendance at

a single school, association with familiar playmates in a familiar neighborhood, close familial ties, regular visits with grandparents, and continuing participation in the neighborhood hockey program. It is certainly true that these contacts and associations contributed importantly to the custodial environment." *Id*, at 580.

At p 21, appellee's reliance on *DeGrow v DeGrow*, 112 Mich App 260, 267, 315 NW2d 915 (1982) makes no sense in the context of this case. Unlike this case, *DeGrow* involved an established custodial environment only with the mother. There was no finding of a joint established custodial environment with both parents.

At p 25, appellee argues, contrary to facts and common sense, that the children's relationship with the Grosse Pointe schools "was severed" by her move to Howell. How is this possible when the children have attended school every day in Grosse Pointe since they became of school age? They have never attended school in Howell. All appellate litigants might wish for the ability to simply make-up the facts that support their arguments rather than being bound by the actual trial court record. Appellee seems determined to turn that wish into her own skewed version of reality.

At pp 27-30, appellee argues that the trial court should have used the preponderance of the evidence standard in evaluating her request to change the children's school enrollment to Howell. Both she and the Court of Appeals fail to acknowledge the trial court's very clear and specific finding that even using the preponderance of the evidence standard, appellee failed to carry her burden of demonstrating that the change was in the children's best interests. Appellant's Appendix 978a.

At p 46, appellee again inaccurately alleges that appellant "acknowledged that the minors live in Osceola/Howell." That is not true. It is undisputed that the children have spent at least as much time since October of 2007 residing with appellant at his home in Grosse Pointe Woods as they have residing with appellee at her Livingston county condominium.

Appellee's reliance at p 49 on *Lewis v Lewis*, 73 Mich App 563, 252 NW2d 237 (1977), is inapposite. Unlike *Lewis*, here the trial court did not fail to interview the children. Instead, the trial court properly conducted the *in camera* interview and came to the conclusion that the children's preference was not reasonable.

Conclusion/Relief Requested

This case may on the surface appear to be a mere school enrollment dispute. It is much more than that. This case presents to this Court the choice between affirming the spirit and letter of Michigan's joint custody statute or sending a message to joint legal custodians that they can engage in unilateral decision-making on important matters affecting their children without fearing the consequences. From a public policy perspective, Michigan is either serious about co-parenting post-divorce or it is willing to relegate the parent without primary physical custody to permanent second-class status.

Here, the trial court's ruling was especially complete and well-considered. Its decision was supported with ample factual findings based on voluminous evidence. The Court of Appeals improperly usurped the trial court's fact-finding role when it erroneously found that the established custodial environment in the homes of both parents would not be changed the proposed enrollment of the children in Howell

schools. Because the established environment would be altered, Ms. Pierron faced a clear and convincing evidence burden. She did not carry that burden.

Even if the Court of Appeals was correct on the preference of the child issue (a point appellant does not concede), it is but one factor among many. Consideration of all best interest factors collectively demonstrates that appellee did not prove her case. The Court of Appeals decision should be vacated and the trial court's order affirmed.

Respectfully submitted,

By:_____ Dated: September 30, 2009

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